No. 86-1639

FILED
APR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

FLOYD H. VINSON - - - - - Petitioner

versus

FORD MOTOR COMPANY - - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BROADUS AND SAMUEL
ARTHUR R. SAMUEL
1810 One Riverfront Plaza
Louisville, Kentucky 40202
(502) 587-6516
Counsel for Petitioner

April 8, 1987

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Whether stating a charge in the EEOC interview statement was sufficient to constitute "filing a charge" pursuant to 29 U.S.C. §626(d) of the Age Discrimination in Employment Act where the EEOC failed to restate the charge on the formal complaint form, which the Petitioner was not shown and he did not sign.

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TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

FLOYD H. VINSON - - - - - - *Petitioner*

v.

FORD MOTOR COMPANY - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The judgment based on a jury finding of willful discrimination and award of damages was entered on January 17, 1985 in the District Court. The judgment n.o.v. setting aside the judgment entered on January 17, 1985 and dismissing the plaintiff's action was entered on October 2, 1985. The opinion of the Sixth Circuit Court of Appeals affirming (2-1) was decided and filed December 3, 1986 and recommended for publication. The order denying the petition for rehearing, en banc, was filed January 16, 1987. The mandate was issued January 27, 1987. Copies of the abovementioned judgments, opinions, and mandate are contained in the Appendix.

JURISDICTION

Judgment was entered in the District Court on January 17, 1985. Judgment n.o.v. was entered upon

timely motion on October 2, 1985. An opinion of the Court of Appeals from a timely appeal was filed on December 3, 1986. A timely petition for rehearing, en banc, was denied and filed January 16, 1987. The mandate issued January 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is the Age Discrimination in Employment Act, 28 U.S.C. §623 (1982).

Section 626(d) provides "No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission."

STATEMENT OF THE CASE

Petitioner spoke with an EEOC interviewer who prepared an "Employee Personal Interview Statement" (See Exhibit "A" in Appendix) in which Petitioner complained of a demotion because of age. Petitioner signed this statement. It was dated January 17, 1980.

Without petitioner's knowledge or signature, a "Charge of Discrimination" was prepared by an EEOC official which did not mention the demotion. Instead, it spoke only of a denial of promotion. (See Exhibit "B" in Appendix). Some two years later petitioner saw this document for the first time during a deposition.

REASON FOR GRANTING THE WRIT

The reason for granting the writ is that the Court of Appeals (6th Circuit) rendered a decision in conflict with rulings of this Court.

A clear and uniform standard must be stated to guide the EEOC and Courts in what constitutes "filing a claim" under the Age Discrimination in Employment Act.

The petitioner adopts the dissenting opinion of Judge Merritt, Circuit Judge for this case in the Court of Appeals, for its argument. He wrote:

> The requirement of "filing a charge" under Section 626(d) should be construed broadly in light of the statutory purpose of the Act and the legislative history of this particular provision. Numerous cases have held that the Act is a broad remedial statute and should be construed liberally. *See, e.g., Oscar Mayer & Co.* v. *Evans,* 441 U. S. 750, 765 (1979) (Blackmun, J., concurring); *Dartt* v. *Shell Oil Co.,* 539 F. 2d 1256, 1260 (10th Cir. 1976) (the Act is "remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment"), *aff'd per curiam,* 434 U. S. 99 (1977); and *Holliday* v. *Ketchum, MacLeod & Grove, Inc.,* 584 F. 2d 1221, 1229-30 (3rd Cir. 1978) (courts should liberally construe statute and be "chary about creating unnecessary procedural bars which may, at the outset, require the dismissal of otherwise meritorious age discrimination claims"). The Supreme Court has also stated that the purposes of the Act should

> not be frustrated by procedural technicalities. *See Love* v. *Pullman Co.*, 404 U. S. 522, 527 (1972) ("Such technicalities are particularly inappropriate in a satutory scheme in which laymen, unassisted by trained lawyers, initiate the process.")

The legislative history of Section 626(d) reinforces the view that this provision is to be construed broadly. The Congressional conference report relating to the 1978 amendments to the Act explicitly identifies the purpose of Section 626(d):

> . . . the basic purpose of the notice requirement . . . is to provide the Department [of Labor] with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the conferees intend that the "charge" requirement will be satisfied by the filing of a written statement *which identifies the potential defendant and generally describes the action believed to be discriminatory.* (emphasis added)

H.R. Conf. Rep. No. 950, 95th Cong., 2nd Sess. 533-34 (1978), *reprinted in* 1978 U. S. Code Cong. & Admin. News 534.

In light of the statutory purpose and legislative history, I believe that Vinson did "file a charge" for purposes of Section 626(d). Vinson should not be held to a higher standard than a pro se litigant in federal court insofar as pleading requirements. Under notice pleading, a pro se litigant would not be required

to specify each transaction as issue; complaining of the overall wrongful conduct would be sufficient.

Vinson mentioned the 1979 demotion in the employee personal interview statement with the EEOC. Under the notice pleading analogy, this should be sufficient to constitute "filing a charge" with respect to the 1979 demotion. Such a construction is consistent with the requirements that courts broadly construe the Act. Moreover, it is supported by the particular legislative history of Section 626(d). In sum, if the statutory scheme is to work as Congress intended, then a layman such as Vinson must not be barred from bringing age discrimination actions under the Act by mere technicalities."

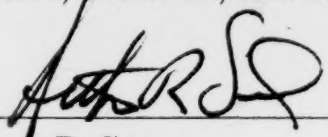
Respectfully submitted,

ARTHUR R. SAMUEL
BROADUS AND SAMUEL
Louisville, Kentucky 40202
1810 One Riverfront Plaza
(502) 587-6516

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Arthur R. Samuel, counsel for petitioner, certify that the attached Petition for Writ of Certiorari and Letter of Appearance was served on respondent by depositing copies of the aforementioned documents in the United States mail, first-class postage prepaid, on 4/8/87 addressed to respondent's counsel, Hon. Jon L. Fleischaker and Kemberly Greene, Citizens Plaza, Louisville, Kentucky 40202.



ARTHUR R. SAMUEL
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Louisville, Kentucky 40202
Counsel for Petitioner

APPENDIX

COURT OF APPEALS UNITED STATES

FOR THE SIXTH CIRCUIT

No. 85-5976

FLOYD H. VINSON, - - - *Plaintiff-Appellant,*

v.

FORD MOTOR COMPANY, - - *Defendant-Appellee.*

JUDGMENT—Filed December 3, 1986

ON APPEAL from the United States District Court for the Western District Kentucky.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

Entered By Order of the Court

John P. Hehman, Clerk

(s) John P. Hehman
Clerk

Issued as Mandate: 1/27/87

A True Copy.

Attest:

(s) Michelle D. Main
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 85-5976

FLOYD H. VINSON, - - - *Plaintiff-Appellant,*

v.

FORD MOTOR COMPANY, - - *Defendant-Appellee.*

ORDER—Filed January 16, 1987

BEFORE: MERRITT, GUY and NORRIS, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of the Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

(s) John P. Hehman
John P. Hehman, Clerk

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 85-5976

FLOYD H. VINSON, - - - *Plaintiff-Appellant,*

v.

FORD MOTOR COMPANY, - - *Defendant-Appellee.*

On Appeal from the United States District Court for the Western District of Kentucky

---

Decided and Filed December 3, 1986

Before: MERRITT, GUY, and NORRIS, Circuit Judges.

GUY, Circuit Judge, delivered the opinion of the court, in which NORRIS, Circuit Judge, joined. MERRITT, Circuit Judge, (pp. 4-6) delivered a separate dissenting opinion.

GUY, Circuit Judge, Plaintiff appeals the entry of judgment notwithstanding the verdit in favor of defendant after a jury trial on his age discrimination claim. For the reasons stated below, we affirm.

Plaintiff is a long-term employee of the Ford Motor Company's Louisville Assembly Plant in Kentucky. In January, 1980, plaintiff filed a complaint with the EEOC alleging age discrimination. The interview with the EEOC indicates that plaintiff complained about a series of events beginning in November, 1977. Included was the fact that in January, 1979, plaintiff had been demoted. The interview sheet ended by plaintiff claiming that

> [i]n April 1979 I was promised by Joe Weingart, Material Manager, that I would be placed in the position of Parts Control and volume scheduling manager, a job I am qualified and held previously for three years. On 1-16-80 this job was assigned to Al Pierce, age 35-36 years old, no experience and less time with the Co.

The charge, as framed by the EEOC, stated: "I believe I were (sic) denied a promotion because of my age."

Plaintiff filed suit in April, 1982, alleging discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623, asserting that (1) he was demoted in January, 1979, because of his age, and (2) he was denied a promotion in January, 1980, because of his age. Before trial, defendant moved for summary judgment as to the 1979 demotion, arguing that plaintiff had never filed an administrative complaint concerning the demotion, and therefore, he had failed to comply with a jurisdictional prerequisite for filing a civil action under ADEA. 29 U.S.C. § 626(d). The trial court denied defendant's motion, noting that plaintiff had referred to the demotion in his interview statement with the EEOC. The case was tried to a jury from January 7 to January 11, 1985. The jury found for plaintiff on his 1979 demotion claim, but against plaintiff on his 1980 failure to promote claim. The jury awarded $2,057.16 for lost wages as a result of the demotion, and also awarded liquidated damages on that claim, for a total award of $5,014.32.

After trial, defendant moved for n.o.v., reasserting the same claims presented in its motion for summary judgment. The court, based on the evidence at trial, this time sustained defendant's motion, finding that, in fact, plaintiff did not file any charge of age discrimination concerning the 1979 demotion with the EEOC or any administrative

agency. Accordingly, the court determined that it was without jurisdiction as to that claim.

It is well settled that the filing of a charge with the EEOC is a jurisdictional prerequisite to the filing of a civil action under ADEA. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979); 29 U.S.C. § 626(d). Moreover, when jurisdiction is challenged, the burden of establishing jurisdiction lies with the party asserting it. The only evidence to support plaintiff's contention that he complained about the 1979 demotion in relation to his age discrimination claim is the interview statement of the EEOC. However, in that statement plaintiff complained about a series of events, the demotion being one of many, which culminated in plaintiff's belief that he had been discriminated against based on age when he was denied a promotion in 1980. Plaintiff does not indicate that these other incidents were other than historical background relative to the specific EEOC charge filed. Furthermore, plaintiff presented no evidence as to the scope of the investigation conducted by the EEOC. The court thus had no way of knowing whether the EEOC attempted to conciliate the demotion claim. Conciliation is an important purpose of the requirement that a claimant first file with an administrative agency. Finally, we note that the requirement that a claimant file a charge which identifies the conduct he believes is discriminatory is not a hypertechnical legal prerequisite. All plaintiff was required to do was identify that conduct which he felt was the result of age discrimination. It does not constitute an unjustifiable burden on claimants to require them to specify each such event. And it is necessary, if the administrative process is to work, that a claimant so articulate his beliefs. Accordingly, the district court did not err in granting judgment n.o.v. in favor of defendant.

In view of our disposition of this claim, we need not discuss other issues raised by plaintiff. The judgment of the district court is AFFIRMED.

MERRITT, Circuit Judge, dissenting. The issue in this case, which arises under the Age Discrimination in Employment Act, 29 U.S.C. § 623 (1982), is whether plaintiff complied with a jurisdictional prerequisite for bringing an age discrimination action. Unlike the majority, I believe that plaintiff did comply with 29 U.S.C. § 626(d), and I therefore dissent.

Section 626(d) provides in pertinent part: "No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." The question on appeal is whether plaintiff's actions were sufficient to constitute "filing a charge" under this provision of the Act with respect to plaintiff's 1979 demotion.

The requirement of "filing a charge" under Section 626(d) should be construed broadly in light of the statutory purpose of the Act and the legislative history of this particular provision. Numerous cases have held that the Act is a broad remedial statute and should be construed liberally. *See, e.g., Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 765 (1979) (Blackmun, J., concurring); *Dartt* v. *Shell Oil Co.*, 539 F. 2d 1256, 1260 (10th Cir. 1976) (the Act is "remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment"), *aff'd per curiam*, 434 U.S. 99 (1977); and *Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, 584 F. 2d 1221, 1229-30 (3rd Cir. 1978) (courts should liberally construe statute and be "chary about creating unnecessary procedural bars which may, at the outset, require the dismissal of otherwise meritorious age discrimination claims"). The Supreme Court has also

stated that the purposes of the Act should not be frustrated by procedural technicalities. *See Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972) ("Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.")

The legislative history of Section 626(d) reinforces the view that this provision is to be construed broadly. The Congressional conference report relating to the 1978 amendments to the Act explicitly identifies the purpose of Section 626(d):

> . . . the basic purpose of the notice requirement is to provide the Department [of Labor] with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the conferees intend that the "charge" requirement will be satisfied by the filing of a written statement *which identifies the potential defendant and generally describes the action believed to be discriminatory.* (emphasis added)

H.R. Conf. Rep. No. 950, 95th Cong., 2nd Sess. 533-34 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 534.

In light of the statutory purpose and legislative history, I believe that Vinson did "file a charge" for purposes of Section 626(d). Vinson should not be held to a higher standard than a pro se litigant in federal court insofar as pleading requirements. Under notice pleading, a pro se litigant would not be required to specify each transaction as issue; complaining of the overall wrongful conduct would be sufficient.

Vinson mentioned the 1979 demotion in the employee personal interview statement with the EEOC. Under the

notice pleading analogy, this should be sufficient to constitute "filing a charge" with respect to the 1979 demotion. Such a construction is consistent with the requirements that courts broadly construe the Act. Moreover, it is supported by the particular legislative history of Section 626(d). In sum, if the statutory scheme is to work as Congress intended, then a layman such as Vinson must not be barred from bringing age discrimination actions under the Act by mere technicalities.

Accordingly, I dissent.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action C 82-0240-L(A)

FLOYD H. VINSON, - - - - - - - *Plaintiff,*

v.

FORD MOTOR COMPANY, - - - - - *Defendant.*

JUDGMENT—Entered October 2, 1985

This action, having been tried before a jury from January 7, 1985 through January 11, 1985, and the Court, having entered a judgment pursuant to jury responses to special interrogatories awarding plaintiff the sum of $5,014.32 with interest, and the defendant having moved for a judgment notwithstanding the verdict, and plaintiff having moved for promotion to a grade 10 and front pay, and the Court having considered the motion and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that the motion for judgment notwithstanding the verdict be and hereby is sustained, and plaintiff's motions are denied, and the judgment entered on January 17, 1985 is hereby set aside, and judgment is hereby entered for defendant, and the action filed by the plaintiff is dismissed with prejudice, defendant to recover its cost herein expended.

This is a final and appealable judgment, and there is no just cause for delay.

Dated _____

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0240 L(A)

FLOYD H. VINSON, - - - - - - - *Plaintiff,*

v.

FORD MOTOR COMPANY, - - - - *Defendant.*

JUDGMENT—Entered January 17, 1985

This action, having been tried by a Jury from January 7, 1985 through January 11, 1985 and the Jury, having filed its responses to special interrogatories,

IT IS ORDERED AND ADJUDGED that the plaintiff, Floyd H. Vinson, be awarded $5,014.32, with interest at the rate of 9.08% per annum from date of judgment until paid.

This is a final and appealable judgment and there is no just cause for delay.

Dated 1-17-85

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 82-0240 L(A)

FLOYD H. VINSON, - - - - - - *Plaintiff,*

v.

FORD MOTOR COMPANY, - - - - *Defendant.*

PARTIAL SUMMARY JUDGMENT

Defendant, having moved for summary judgment as to all the claims advanced by the plaintiff, and the Court, having filed its memorandum opinion and being fully advised in the premises,

IT IS HEREBY ORDERED AND ADJUDGED that the motion of the defendant for summary judgment be and it is hereby denied, except as to plaintiff's complaint concerning his removal from his position on November 17, 1977.

This is not a final and appealable judgment.

Dated 5-3-83

(s) Charles M. Allen
Charles M. Allen
Chief Judge

cc: Counsel of Record

EXHIBIT "A" (copied)

EMPLOYEE PERSONAL INTERVIEW STATEMENT

01 17 80
(Date)
(Place of interview)

I, Mr. Floyd H. Vinson, Sr., of 3809 Debson Way, Louisville, Ky. 40222, (502) 426-6834, 45¾ years of age, have been employed by Ford Motor Co. Fern Valley Rd. for the approximate period from Nov. 1974 to Present. Prior to Louisville assignment 1964-74 Michigan Truck Plant as Sup. of Specifications and Audit—was Material Handling Manager.

Statement: I have been employed by Ford Motor Co. for the past 15½ years. In Nov. 1977 I began to experience problems on my job. I was 45 years old.

November 1977 I was removed from my position as a Material Handling Manager with no assignment until March 78. March of 78 I was given the assignment of Change over Coordinator. I was passed over for a 6% salary increase while in this position.

March 79 I was told that there were no job assignments for me unless I took a position of Specification and Audit Sup. This position subsequently caused me to be reduced two (2) grades in pay. In Dec. 79 I was told to turn in my lease car. Since that time I have received constant harassment by being passed over for open positions that would put me in the grade level I originally held. In April 1979 I was promised by Joe Weingart, Material Manager that I would be placed in the position of Parts Control and Vehicle Scheduling Manager, a job I am qualified and held previously for (3) three years. On 1-16-80 this job was assigned to Al Pierce, age 35-36 years old, no experience and less time with the co.

/s/ Floyd H. Vinson

EXHIBIT "B"
(PLEASE PRINT OR TYPE)

...VED BY GAO — 180541 (RO511) pires 1-31-81	CHARGE OF DISCRIMINATION IMPORTANT: This form is affected by the Privacy Act of 1974, see Privacy Act Statement on reverse before completing it.	...ARGE NUMBER(S) (AGENCY USE ONLY) ☐ STATE/LOCAL AGENCY ☒ EEOC 016-80-8026

...ual Employment Opportunity Commission and
(State or Local Agency)

...ME (Indicate Mr., Ms. or Mrs.)	HOME TELEPHONE NUMBER (Include area code)
Mr. Floyd H. Vinson	
REET ADDRESS	502-426-6834
3809 Debson Way	
TY, STATE, AND ZIP CODE	COUNTY
Louisville, Kentucky 40222	Jefferson

AM'ED IS THE EMPLOYER LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR OCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below).

AME	TELEPHONE NUMBER (Include area code)
Ford Motor Company	502-566-9511
TREET ADDRESS	CITY, STATE, AND ZIP CODE
Fern Valley Road	Louisville, Kentucky
AME	TELEPHONE NUMBER (Include area code)
TREET ADDRESS	CITY, STATE, AND ZIP CODE

CAUSE OF DISCRIMINATION BASED ON MY (Check appropriate box(es))

☒ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☒ OTHER (Specify) Age

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, and year) 021680

THE PARTICULARS ARE

I believe I were denied a promotion because of my age .

I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures

I declare under penalty of perjury that the foregoing is true and correct

NOTARY — (When necessary to meet State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge information and belief

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day month and year)

EXHIBIT "B"

Supreme Court, U.S.
FILED
MAY 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1639

In The
Supreme Court of the United States
October Term, 1986

FLOYD H. VINSON

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JON L. FLEISCHAKER,
Counsel of Record for Respondent
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WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

May 8, 1987

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Courts below lacked jurisdiction over Petitioner's demotion claim filed pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 623 *et seq.*, because Petitioner failed to file a charge with the Equal Employment Opportunity Commission concerning said demotion.

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TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

COUNTERSTATEMENT OF THE CASE

Petitioner was employed by Respondent[1] since 1964, and came to the Louisville Assembly Plant in 1974 as a Material Handling Manager, a salary grade 10 position in the Materials Department. In April 1978, the Materials Department at the Respondent's Louisville Assembly Plant consisted of five grade 10 managers reporting to Joe Weingart, the Materials Manager [Transcript of Trial (hereinafter "Tr") Vinson, 196; Weingart, 301].

In April 1978, Respondent decided to produce a new line of automobile at the Louisville Assembly Plant, necessitating the appointment of a Change-Over Coordinator to direct this change. This is a standard temporary position created whenever a new launch occurs [Tr. Ryan, 339]. Since Petitioner had requested reassignment to a different Ford plant, he was selected for this temporary grade 10 job while Respondent attempted to locate an alternative position for Petitioner. Respondent explained to Petitioner that the Change-Over Coordinator position would expire within one year [Tr. Vinson, 93; Weingart, 280; Ryan, 336, 399].

In the months preceding the expiration of Vinson's assignment as Change-Over Coordinator, Respondent made extensive efforts to find alternative opportunities for Petitioner [Tr. Ryan, 399]. None was available, however, because the automobile industry was in a severe economic slump [Tr. Vinson, 136; Ryan, 399] and the Louisville plant was experiencing severe reductions in the salaried

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[1] The Rule 28.1 Statement of subsidiaries and affiliates of Ford Motor Company is included in Appendix A. Ford Motor Company has no parent corporation.

workforce [Tr. Ryan, 403]. Division headquarters had directed the Louisville plant to reduce the number of grade 10 positions in the Materials Department from five to four [Tr. Vinson, 114; Weingart, 313; Ryan, 336] and, pursuant to Company policy, one of the grade 10 employees had to be demoted.

In January 1979, Louisville made its decision to recommend the demotion of Petitioner, based on the factors required by Ford policy on reductions in the salaried workforce [Tr. Weingart, 313-316; Ryan, 325, 359-360]. Those policies require a comparative consideration of the performance and potential for promotion of all employees within the salary grade classification in question. On January 27, 1979, Weingart met with Petitioner, explained the situation to him and notified him that he was being demoted to a grade 8 position [Tr. Vinson, 35, 108]. Although Petitioner began in the new position immediately, the reduction in his salary was not effective until April 1, 1979 [Tr. Vinson, 37-38].

Despite the fact that he was aware of his rights under the Age Discrimination in Employment Act when he was advised of his demotion in January 1979 [Tr. Vinson, 44], Petitioner filed no charge of age discrimination with any public agency regarding his demotion [Tr. Vinson, 117-118]. In addition, he made no claims of discrimination to any official of Respondent [Tr. Ryan, 395-396]. The only complaint he made regarding his demotion was to an individual in the industrial relations department, of whom he asked "how's that [the demotion] possible?" Petitioner never complained about or mentioned age discrimination regarding his demotion [Tr. Vinson 108].

Subsequently, Petitioner had a conversation with Weingart about possible future job assignments, but Petitioner never raised his age or any claim of age discrimination arising out of his demotion [Tr. Vinson, 38, 40-43, 118-119]. Neither Weingart nor any other official of Respondent knew Petitioner had such a complaint or would file such a claim [Tr. Ryan, 395-396]. Petitioner met in September 1979 with the Assistant Plant Manager and the Industrial Relations Manager. Although he claims he was convinced at that time that Respondent had discriminated against him because of his age, Petitioner did not file a complaint with any agency alleging age discrimination in his demotion after that meeting [Tr. Vinson, 127; Baker, 224; Ryan, 396]. In fact, Petitioner *never* filed any charge or complaint regarding the 1979 demotion with the EEOC or any other administrative agency. Moreover, Petitioner never suggested in his testimony that any Company official exerted efforts to delay or prevent his filing such a charge.

In mid 1979, the Louisville Assembly Plant discontinued the second production shift. This entailed further reductions in the work force, including a further reduction in grade 10 positions in the Materials Department. On January 15, 1980, the Louisville plant evaluated the performance and potential of the remaining four grade 10 employees in the Materials Department and one of them was demoted. A grade 10 position for the second shift was eliminated and the three remaining grade 10 employees were reassigned to the remaining grade 10 positions. This reassignment was not a promotion [Tr. Weingart, 308; Ryan, 369]. Although Petitioner claimed he should have been promoted at that time, he agreed that there were no promotions in January 1980 to a grade 10 position in Louis-

ville, and that no grade 8 employee was promoted or considered for a promotion to grade 10 [Tr. Vinson, 126-127]. After a full trial, the jury also found that there was no promotion in 1980 and returned a verdict for Respondent on that claim.

When Petitioner failed to receive a promotion in January 1980, he filed a charge of discrimination with the EEOC on January 17, 1980, alleging only that he had been denied this promotion because of his age [Tr. Vinson, 44, 127]. In that charge Petitioner said absolutely nothing about the January 1979 demotion. That charge stated solely and simply: "I believe I were [sic] denied a promotion because of my age" [Tr. Vinson, 128]. In his employee personal interview statement to the EEOC, Petitioner mentioned several background facts about his employment dating back to 1964, including the fact that he had been demoted one year earlier. However, Petitioner made no claim in that statement [attached as Exhibit A to Petitioner's Petition for Certiorari] that the 1979 demotion was due to his age or was discriminatory in any way. In fact, Petitioner never offered the employee personal interview statement as evidence, and he never testified that he did not see or agree to the EEOC charge that was actually filed. There is absolutely no proof in the record of this case that the EEOC ever investigated the demotion claim or ever informed Respondent that Petitioner was protesting his demotion.

On April 10, 1982, Petitioner filed suit in the United States District Court under the Age Discrimination in Employment Act, 29 U.S.C. § 623 *et seq.* In the suit, he alleged that he was denied a promotion because of his age in January 1980 and, *for the first time,* Petitioner alleged that

he was demoted in January 1979 because of his age. The District Court denied Respondent's motion to dismiss the demotion claim. The action was tried to a jury in January, 1985, which found for Petitioner on his demotion claim but against Petitioner on his failure to promote claim.

After trial Respondent moved for judgment notwithstanding the verdict on the grounds, *inter alia*,[2] that the District Court lacked jurisdiction over Petitioner's allegation of age discrimination in his 1979 demotion because that claim was never the subject of a complaint to the EEOC. The District Court found that Petitioner had failed to file any charge with the EEOC concerning his 1979 demotion and entered judgment for Respondent on this and other grounds [Memorandum Opinion, R.E. No. 46 at p.2]. The Court of Appeals for the Sixth Circuit affirmed:

> The [district] court, based on the evidence presented at trial, this time sustained [Respondent's] motion, finding that, in fact, [Petitioner] did not file any charge of age discrimination concerning the 1979 demotion with the EEOC or any administrative agency. Accordingly, the court determined that it was without jurisdiction as to that claim.

Vinson v. Ford Motor Company, 806 F.2d 686, 688 (6th Cir. 1986).

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[2] The other grounds were: [1] even if the court found the 1980 EEOC charge somehow included a claim regarding his demotion, it was untimely because it was filed more than 300 days after the demotion, 29 U.S.C. § 626(d)(2); and [2] the lawsuit was filed some three years and three months after Petitioner's demotion so that his claims regarding the demotion were barred by the applicable statute of limitations, 29 U.S.C. § 255(a).

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SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Sixth Circuit is entirely consistent with applicable decisions of this Court. This Court has held that the filing of a charge of discrimination with the EEOC is a jurisdictional prerequisite to the filing of a civil action under the Age Discrimination in Employment Act. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). Because the District Court, after a full trial on all contested issues including jurisdiction, found that Petitioner had failed to file an EEOC charge regarding his 1979 demotion, the District Court lacked jurisdiction over the claim and properly entered judgment for Respondent notwithstanding the jury verdict for Petitioner. Consistent with *Oscar Mayer, supra,* and other decisions of this Court, the Court of Appeals properly affirmed.

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ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE PETITIONER CAN SHOW NO SPECIAL OR IMPORTANT REASON FOR GRANTING THE WRIT, AS REQUIRED BY SUPREME COURT RULE 17.1.

Supreme Court Rule 17.1 provides that review on writ of certiorari will be granted "only when there are special and important reasons therefor." The Rule sets forth three such reasons, including SCR 17.1(c):

> (c) When a . . . federal court of appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner apparently refers to SCR 17.1(c) when he asserts that the writ should be granted because "the Court of Appeals (Sixth Circuit) rendered a decision in conflict with the rulings of this Court" [Petition p. 3].

Petitioner fails, however, to identify any decision of this Court which conflicts with the decision of the Court of Appeals for the Sixth Circuit in the present case. He cannot do so, because the Court of Appeals decision is entirely consistent with applicable decisions of this Court, most notably *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979), one of the three Supreme Court cases cited by Petitioner.[3]

In *Oscar Mayer, supra,* this Court construed the provisions of the Age Discrimination in Employment Act ("ADEA"), which require a party to file the appropriate administrative charge of discrimination as a prerequisite to filing a civil action in federal court. Those sections provide, in pertinent part:

> No civil action may be commenced by an individual under this section until sixty days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission . . .

29 U.S.C. § 626(d).

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[3] All three of the Supreme Court cases cited by Petitioner deal with the statutory deadlines for timely filing of an EEOC charge. Only *Oscar Mayer, supra,* also concerns the issue involved in the present case: whether a District Court has jurisdiction when the plaintiff had filed no EEOC charge at all. While this Court has held that the statutes' complicated *time* requirements for filing an EEOC charge are not jurisdictional and should be liberally construed, the actual filing of the charge, as set forth in 29 U.S.C. §§ 626(d) and 633(b), is jurisdictional. *Oscar Mayer, supra.*

> No suit may be brought under § 626 of this Title before the expiration of sixty days after proceedings have been commenced under the state law, unless such proceedings have been earlier terminated: . . .

29 U.S.C. § 633(b).

Construing these provisions, this Court unequivocally held that the filing of a charge with the EEOC is a jurisdictional prerequisite to the filing of a civil action under the ADEA. *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979).

This Court has reiterated this rule in other decisions. *See, e.g., Great American Federal Savings & Loan Ass'n v. Novotny,* 442 U.S. 366 (1979), where this Court considered the parallel provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), and held that "an employee who believes himself aggrieved *must first file a charge with the federal Equal Employment Opportunity Commission.*" *Id.* at 373 [emphasis added]. In a footnote the Court stated that "filing a complaint with that authority is a predicate for assertion of the federal rights involved." *Id. Cf. Board of Regents of the University of the State of New York v. Tomanio,* 446 U.S. 478, 491 (1980).

The lower courts have uniformly adhered to the rule articulated in *Oscar Mayer, supra. See, e.g., McTighe v. Mechanics Educ. Soc. of America Local 19,* 772 F.2d 210 (6th Cir. 1985); *O'Malley v. GTE Service Corp.,* 758 F.2d 818 (2d Cir. 1985); *Jones v. Truck Drivers Local Union No. 299,* 748 F.2d 1083, 1086 (6th Cir. 1984); *Wright v. Tennessee,* 628 F.2d 949 (6th Cir. 1980); *Ewald v. Great Atlantic & Pacific Tea Co.,* 620 F.2d 1183 (6th Cir. 1980), *vacated on other grounds,* 449 U.S. 914 (1980), *remanded,*

644 F.2d 884 (6th Cir. 1981), *cert. denied,* 451 U.S. 985 (1981). In *Wright, supra,* the Sixth Circuit clearly held that while the *time* for filing with the EEOC (*i.e.,* the 180/300-day requirement) is not jurisdictional, the filing of a charge *is* jurisdictional.

The Court of Appeals Opinion in the present case, like the many other decisions addressing this question, is consistent with this Court's ruling in *Oscar Mayer, supra.* Because Petitioner failed to file a charge of age discrimination with the EEOC regarding his 1979 demotion, the District Court lacked subject matter jurisdiction over Petitioner's claim concerning his demotion. Recognizing the rule articulated by this Court in *Oscar Mayer, supra,* the Court below held:

> It is well settled that the filing of a charge with the EEOC is a jurisdictional prerequisite to the filing of a civil action under ADEA. *Oscar Mayer* [*supra*]; 29 U.S.C. § 626(d). . . . [T]he *requirement that a claimant file a charge which identifies the conduct he believes is discriminatory is not a hypertechnical legal prerequisite.* All [Petitioner] was required to do was identify that conduct which he felt was the result of age discrimination. It does not constitute an unjustifible burden on claimants to require them to specify each such event. And it is necessary, if the administrative process is to work, that a claimant so articulate his beliefs. Accordingly, the district court did not err in granting judgment n.o.v. in favor of defendant [emphasis added].

Vinson v. Ford Motor Company, supra at 688.

Nothing in the Court of Appeals Opinion conflicts in any way with this Court's decision in *Oscar Mayer, supra,* or any other decision of this Court. Respondent argues that this Court's statement in *Oscar Mayer, supra,* and the

two other cases he cited that "courts should liberally construe the statute" [Petition, p. 3] means his failure to file a charge concerning his 1979 demotion should have been excused below. Petitioner misreads *Oscar Mayer* and the other decisions.

This Court considered other issues in *Oscar Mayer,* including whether the statutory time limits for commencing administrative proceedings were jurisdictional. The Court held that those statutory provisions did not make timely EEOC filing a precondition for a civil action, so the complicated time requirements in the Act should be liberally construed. *Oscar Mayer, supra* at 762, *citing Love v. Pullman Co.,* 404 U.S. 522, 527 (1972). Nevertheless, even applying this liberal construction of the statute's time limitations, there nevertheless remains the jurisdictional requirement that an EEOC charge concerning the alleged discriminatory act must be filed before a civil action may be commenced.

Petitioner now argues that this Court's discussion in *Oscar Mayer* of the unrelated timeliness issue somehow applies to the present case and, therefore, that his January 17, 1980 EEOC charge concerning a failure to promote him in 1980 should be "liberally construed" to include an additional and entirely separate charge that he was demoted one year earlier because of his age. This demotion in January 1979 was entirely separate from and independent of the failure of Petitioner to be promoted in 1980 and Petitioner's argument flies in the face of the *Oscar Mayer* rule because Petitioner's 1980 EEOC charge contained *no* allegation whatsoever of age discrimination relating to his demotion. His charge stated simply: "I believe I were [sic] denied a promotion because of my age."

Petitioner argues that the fact that he "mentioned the 1979 demotion in the Employee Personal Interview Statement" [Petition p. 5] should be sufficient for this Court to adopt his outlandishly strained interpretation of his 1980 EEOC charge. Petitioner is in error. He mentioned numerous facts about his employment dating back to 1964 in his employee personal interview statement. As the Court of Appeals specifically noted, however, Petitioner did not claim that any of these incidents, other than the 1980 denial of a promotion, was caused by age discrimination:

> [I]n that statement [Petitioner] complained about a series of events, the demotion being one of many, which culminated in [Petitioner's] belief he had been discriminated against based on age when he was denied a promotion in 1980. [Petitioner] does not indicate that these other incidents were other than historical background relative to the specific EEOC charge filed.

Vinson v. Ford Motor Company, supra at 688.

This Court has held that such "historical background" does not constitute a separate and independently cognizable claim of discrimination.

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). *A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately con-*

> *sidered, it is merely an unfortunate event in history which has no present legal consequences.*

United Air Lines v. Evans, 431 U.S. 553, 558 (1977) [emphasis added].

The District Court and the Court of Appeals properly found that the mere mention of the 1979 demotion by Petitioner in his 1980 statement to the EEOC, without any allegation that it was discriminatory, simply does not constitute a "charge" filed with the EEOC.[4] Petitioner's argument is completely contrary to the requirement that an EEOC charge be explicit on its face about the acts of discrimination alleged. His 1980 EEOC charge alleged discrimination *only* in his 1980 promotion: "I believe I were [sic] denied a promotion because of my age." To construe that charge to encompass a 1979 demotion would violate the EEOC regulation which requires that "[e]ach charge should contain . . . [a] clear and concise statement of the facts, including the pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. ¶1601.12(a)(3). This Court has held that "[u]ntil rescinded, this rule is binding on . . . complainants." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 67 (1984).

Petitioner was obliged not only to allege the proper jurisdictional facts but also to establish "by competent proof" that the District Court had jurisdiction over his 1979 demotion claim. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Petitioner did not

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[4] Moreover, it is questionable whether the employee personal interview statement itself can constitute a formal EEOC charge. *Proffitt v. Keycom Electronic Publishing*, 38 E.P.D. (CCH) ¶35,783 (N.D. Ill. 1985).

do so. Even if Petitioner could legitimately argue that the employee personal interview statement constituted an EEOC charge, that statement was never mentioned or otherwise proven "by competent proof" at trial. *Id.* Moreover, Petitioner never testified that he had not seen or agreed to the wording of the 1980 EEOC charge, and he never offered proof that the EEOC investigated a demotion claim or informed Respondent that such a claim existed. After a five day trial the District Court made a factual determination that Petitioner had not filed the required EEOC charge concerning the 1979 demotion and that the District Court, therefore, lacked subject matter jurisdiction over that allegation.[5]

The decision of the Court of Appeals follows exactly this Court's holding in *Oscar Mayer, supra,* that the actual filing of an EEOC charge is a jurisdictional prerequisite to bringing a civil action. Petitioner has identified no Supreme Court decisions to the contrary. Therefore, the present Petition for Writ of Certiorari should be denied.

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[5] Petitioner's case was frought with problems in addition to the lack of subject matter jurisdiction over his demotion claim. First, even if Petitioner's January 1980 charge of discrimination were deemed to encompass his January 1979 demotion, the January 1980 charge was filed with the EEOC more than 300 days after the demotion. Thus, the January 1980 charge was untimely as to the 1979 demotion. 29 U.S.C. § 626(d)(2). Moreover, Petitioner presented absolutely no evidence that would justify tolling this time requirement.

Second, Petitioner did not initiate the lawsuit until April 10, 1982, some three years and three months after his demotion. Therefore, his claim of discriminatory demotion was barred by the applicable statute of limitations. 29 U.S.C. § 255(a).

CONCLUSION

For the reasons stated above, the Respondent, Ford Motor Company, respectfully submits that there are no special or important reasons for granting a Writ of Certiorari in this case, and respectfully urges this Court to deny the present Petition.

Respectfully submitted,

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APPENDIX A

RULE 28.1 STATEMENT

The following is a listing of subsidiaries (except wholly owned subsidiaries) and affiliates of Respondent Ford Motor Company:

Agromak, S.A. de C.V. (FTA)
Allied Tractor Limited
American Network, Inc.
Amim Holdings Sdn. Bld.
Anhanguera Leasing S.A.-Arrendamento Mercantil
Assembly Plant Material Services, Inc.
Bongotti S.A. Industria e Commercio de Radiadores
Canapro S.A.R.L.
Carnegie Group Inc.
Carplastic, S.A.
Ceradyne Advanced Products, Inc.
Compania Financiera de Inversones y Credito S.A.
Conix Corporation
Consorcio Nacional Ford Ltda.
Distribuidora Ford de Titulos e Valores Mobiliarios Ltda.
Double Eagle Steel Coating Company
Eik & Hausken A/S
Escorts Tractors Limited
Essex Manufacturing
Eveleth Taconite Company
Excel Industries
Fabrica de Tractores Agricolas S.A.
Fairlane Woods Associates
FCP Finance Corporation
1st Nationwide Network, Inc.
Foral Services Proprietary Ltd.
Ford Administracao e Consorcios Ltda.
Ford Brasil S.A.
Ford Credit A.B.
Ford Credit A/S
Ford Credit B.V.

Ford Credit Bank Aktiengesellschaft
Ford Credit N.V.
Ford Credit S.A.
Ford Credit South Africa (Proprietary) Ltd.
Ford Distribuidora de Produtos de Petroleo Ltda.
Ford Financiadora S.A. Credito, Financiamento e Inv.
Ford Investitions-GmbH
Ford Investitions GmbH & Co. oHG
Ford Lio Ho Motor Company Ltd.
Ford Motor Company Aktiebolag
Ford Motor Company A/S
Ford Motor Company (Austria) K.G.
Ford Motor Company (Belgium) N.V.
Ford Motor Company of Australia Limited
Ford Motor Company of Canada, Limited
Ford Motor Company of New Zealand Limited
Ford Motor Company Private Limited
Ford Motor Company (Switzerland) S.A.
Ford Motor Credit Company of New Zealand Limited
Ford Motor Norge A/S
Ford Nederlands N.V.
Ford Overseas Finance N.V.
Ford Sales Company of Australia Limited
Ford Vehicle Finance
Ford Versicherungs-Vermittlungs GmbH
Ford Versorgungs und Unterstutzungseinrichtung GmbH
Ford-Werke Aktiengesellschaft
Fords Vagnskadegaranti A.B.
General Electric Credit Auto Resale Service, Inc.
Halla Climate Control Corp.
Hokkai Ford Tractor Co., Ltd.
Humboldt Mining Company
Implementos Agricolas Mexicanos, S.A.
Iveco Ford Truck Limited
Kia
Mazda Motor Corporation
Metro Investment Service Corporation
Nascote Industries, Inc.
Nemak, S.A.
New Holland Japan Inc.
New River Casting Company

Otomobil Sanayii A.S. (Otosan)
Oy Ford Ab
Oy-Ford Rahoitus Ab
Quimica Parker, S.A. de C.V.
Renaissance Center Partnership
Renaissance Center Venture
Saar-Industrie GmhH
Sao Francisco Maquinas e Ferramentas Ltda.
South African Motor Corporation (Proprietary) Limited
Sukat Real Estate Holdings
Synthetic Vision Systems, Inc.
TG Ford Associates
Trans Canada Glass Ltd.
Thace
Vitro Flex S.A.